Supreme Court, U.S.
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No. 98-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

VERNA MONKS, a/k/a
VERNA STAFFORD,

Petitioner,

-v.-

NEVILLE MASSIE, Warden
of the Mabel Bassett
Correctional Center,

Respondent.

On Petition For A Writ of Certiorari to
The Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioner should have been granted a Certificate of Appealability.

2. Whether the lower court erred in denying the Petitioner habeas corpus relief due to her increased punishment at her resentencing hearing due to vindictiveness on the part of the resentencing judge.

PARTIES TO THE PROCEEDING BELOW

The caption of the case includes the names of all parties.

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OPINIONS BELOW

The decision of the Tenth Circuit Court of Appeals is not reported, and is reprinted in the appendix. (App. 1-3).

Other Relevant Opinions and Orders

The Order of the United States District Court For The Western District of Oklahoma denying the Petitioner's Petition For Habeas Corpus Relief is not a reported case, and is reprinted in the appendix. (App. 27-29). This Order is an order affirming the Report and Recommendation of the Magistrate Judge recommending denial of the Petition For A Writ Of Habeas Corpus.

The Report and Recommendation of the United States Magistrate Judge recommending denial of the Petition For A Writ of Habeas Corpus is reprinted in the Appendix. (App. 4-21).

The Post Convicting Findings of the District Court of Oklahoma County, State of Oklahoma, granting the Petitioner's Application For Post Conviction Relief due to her void indeterminate sentence is reprinted in the Appendix. (App. 22-23).

JURISDICTION

The Order and Judgment of the Tenth Circuit Court of Appeals was issued on July 23, 1998. (App. 1-3). The decision affirmed the Order of the United States District Court For the Western District of Oklahoma's Order and Judgment of October 29, 1997, denying the Petitioner's Petition For A Writ of Habeas Corpus and upholding the Petitioner's increased sentence received at the Petitioner's resentencing hearing in the Oklahoma County District Court for the State of Oklahoma.. The Petition For A Writ of Habeas Corpus was filed in the federal district court under 28 U.S.C. Sec. 2254.

No rehearing was requested.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the law of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its

jurisdiction the equal protection of the laws.

Section 2254 of 28 U.S.C. states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Factual Background

On March 11, 1980, subsequent to plea bargaining, the Petitioner pled guilty to two counts of second degree murder in the District Court of Oklahoma County, case numbers CRF-80-1153 and CRF-80-1154, before the Honorable Charles Owens, District Judge. The plea agreement was ten years to life on each count, to run

concurrent. That indeterminate sentence of ten years to life was the sentence imposed. Judge Owens ordered

punishment under 57 Okla. Stat. Sec. 353 which provided for indeterminate sentences. Subsequently, 57 Okla. Stat. Sec. 353 was found to be inapplicable where a life sentence is the maximum.

The Petitioner subsequently filed an Application For Post-Conviction Relief, in the District Court of Oklahoma County, State of Oklahoma, requesting that her sentences be modified to a sentence of ten (10) years. The State of Oklahoma filed a response to the Petitioner's application, acknowledging the possibility that the Petitioner's sentence might be illegal. The State requested that the Honorable Richard Freeman conduct a resentencing hearing if the application was sustained.

The application was sustained, however, Judge Freeman ordered the Petitioner to undergo resentencing, rather than granting her request for a sentence reduction. The court held a resentencing hearing on the 7th and 8th days of August, 1989. At the conclusion of the evidence, Judge Freeman imposed two life sentences, to run consecutively.

Proceedings.

The Petitioner filed for post-conviction relief The increased sentences were upheld in Stafford v. State, 800 P.2d 738 (Okla. Cr. 1990).

The Petitioner, in her sole appearance in federal court for any purpose, filed a Petition For A Writ of Habeas

Corpus under 28 U.S.C. Sec. 2254 in the United States District Court For the Western District of Oklahoma. On October 7, 1997, United States Magistrate Judge Gary M. Purcell entered a Report and Recommendation which recommended that the Petition For A Writ of Habeas Corpus be denied. On October 29, 1997, the district court entered an Order and Judgment denying the Petition For A Writ of Habeas Corpus, and denying a certificate of appealability. (App. 27-29). The court found that no presumption of vindictiveness arose from her increased sentences and (2) no actual vindictiveness had been shown by the Petitioner. (App. 27-29).

The Petitioner timely filed an appeal in the Tenth Circuit Court of Appeals. On July 23, 1998, the Tenth Circuit Court of Appeals entered an Order and Judgment denying the certificate of appealability and dismissed the appeal. (App. 1-3).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for the reason that the Petitioner's increased sentences at her resentencing hearing was a violation of her right to due process.

I. IT WAS ERROR TO DENY THE PETITIONER A WRIT OF HABEAS CORPUS DUE TO HER ILLEGAL CONFINEMENT IN STATE PRISON DUE TO FEDERAL CONSTITUTIONAL ERROR.

The Petitioner is confined in the state penitentiary due to the imposition of increased sentences at rehearing, which harsher sentences were imposed as a result of vindictiveness on the part of the resentencing judge. The increase in the sentences constitutes a violation of due process, entitling her to relief under 28 U.S.C. Sec. 2254, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings **unless** the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The writ of habeas corpus should have been granted to the Petitioner, as the decision of the state court was contrary to and involved an unreasonable application of clearly established federal law as determined by this Court in the following cases.

The Petitioner has been penalized for exercising her right to apply for relief due to the original invalid indeterminate concurrent sentences of ten years to life on the

two counts of second degree murder. She initially received indeterminate sentences, the purpose of which is rehabilitative in nature, as set out in Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974) in the following language:

> A major purpose of any indeterminate sentence provision is to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community. By keeping the minimum low, the prisoner is encouraged "to earn favorable consideration for parole in accord with the public policy embodied in the parole statutes". (Emphasis added).

In keeping with the underlying purpose of indeterminate sentencing, at the Petitioner's first sentencing by The Honorable Charles Owens, the judge stated to her that:

> I sentence you in each case to an indeterminate sentence of not less than ten years, nor more than life. . . An indeterminate sentence means just that of course. It means that you are sentenced to that term of imprisonment. And the time you actually spend in the penitentiary depends to a great extent on you, your conduct . . . That's not for the Court. That's a matter addressed within the executive branch of government. But that's what it means.

The Petitioner was a model prisoner, attempting to

rehabilitate herself during her confinement. She attended every rehabilitative activity available, earned two associate degrees, worked while in prison, entered a religion, and helped other inmates, as was indicated by certificates and records attached to her Petition For A Writ of Habeas Corpus.

The resentencing judge's imposition of life sentences, rather than a reasonable number of years, and additionally imposing the life sentences to run consecutively was punitive in nature for seeking relief which she was entitled to seek.

The resentencing judge's refusal to modify the Petitioner's sentences is in opposition to what the courts had done for other prisoners imprisoned indeterminately on murder convictions. Other prisoners had received reduced sentences in response to their requests for modification of their indeterminate sentences. Instead of modifying the Petitioner's illegal sentence as had been for others, such as modification to the minimum sentence originally imposed, or reduced to time already served, the Petitioner's sentence was increased, as a penalty for requesting that her illegal sentence be corrected.

This Court has held that the imposition of increased punishment upon resentencing is unconstitutional. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) set out the general rule that due process forbids judicial vindictiveness from entering into resentencing which results in a more severe sentence than originally given. This Court stated that it is patently unconstitutional to increase the sentence for exercising the defendant's right to attempt to get his original conviction set aside because of constitutional error. 395 U.S. at 724. This Court stated that "due process

also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge". Id. at 725. This Court further held that:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (Emphasis added)

Id. at 726. As discussed below, the resentencing judge gave no reason for increased sentences based on the Petitioner's conduct occurring **after** the time of the original sentencing proceeding. In fact, in the transcript of the resentencing, the judge referred to the original sentence and stated:

> "You know, it's not our place here today to try to second guess Andy Coats[1] or Judge Owens on things that they did many years ago."

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[1] Andy Coats was the District Attorney in Petitioner's criminal cases.

Subsequent to Pearce, the Court in Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) reiterated that:

> Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to appeal, or to attack collaterally their conviction".

93 S.Ct. At 1981. This Court, at footnote 11 further explained that:

> While there is no per se constitutional right to appeal, this Court has frequently held that once a State establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all".

Id. That was further explained in Griffin v. Ilinois, 34 L U.S. 12, 76 S.Ct. 585 (1958) wherein this Court explained:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unseasoned distinctions that can only impede open and equal access to the courts.

It is undeniable that the State of Oklahoma provides for direct appeal and post-conviction relief. The Petitioner in

Chaffin was denied federal habeas relief. However, it is important to distinguish between that case and this case in that "[t]he parties agree that the jury was not aware of the length of the sentence meted out by the former jury". Id. at 1979. Petitioner's resentencing judge was aware that she had received a lighter sentence at the first sentencing.

The resentencing judge's vindictiveness is evidenced by the statements made to the Petitioner, including:

> "I suppose there is no end to the lessons that one might learn from this particular set of circumstances from Ms. Stafford's point of view. One thing, unfortunately that we learn, we all have to learn it sooner or later, and maybe this is later for her, but **you shouldn't ask for something, lest it might be granted to you. She's asked for a resentencing, and that's what she is here for."**

(Rehrg. Tr. 296; App. 25). Additionally, the judge remarked:

> "And when you ask for something that you don't want or that you don't expect, it may come as a shock to you, but you've asked for a resentencing, and I've got to do it."

(Rehrg. Tr. 300; App.26). Further, the judge stated:

> **"[B]ut I would wager that there is one of the hottest corners of Hell, vacant, that has your name right above it and they are waiting for you."**

Id. The judge further added:

> "Everyone knows, everyone in the business these days knows a life sentence is considered 45 years. You are considered for parole at 45 years on a life sentence. If I gave you a thousand years, you'd be considered for parole at 45, so it doesn't really matter. The length of time that I give you I don't think makes any difference.
>
> I will give you the maximum that this particular crime carries and that is life. I will give that to you on both counts and I will certainly run them consecutively, certainly consecutively".

Id.

The Petitioner has shown that the increased sentences were imposed to to presumed as well as actual vindictiveness, even though she is only required to show presumed vindictiveness. In the Magistrate Judge's Report and Recommendation, the case of Alabama v. Smith, 490 U.S. 794 (1989) was cited. However, as stated in the Report, in Alabama the Supreme Court concluded that there is no presumption of vindictiveness if the increased sentence follows a trial when the original sentence was imposed pursuant to a guilty plea. Id at 803. In circumstances in which vindictiveness by the sentencing judge cannot be presumed, the Court in Alabama found that the defendant has the burden to demonstrate that the resentence was the result of actual vindictiveness. Id at 799-800. There was no trial involved in the Petitioner's case.

In Green v. United States, 355 U.S. 184, 78 S.Ct. 221,

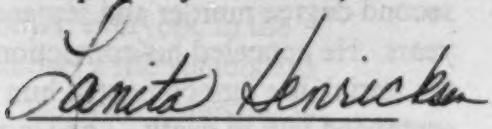
2 L.Ed.2d 199 (1957) the defendant was charged with arson and first degree murder. The jury found him guilty of second degree murder and sentenced him to five to twenty years. He appealed his conviction of second degree murder. On retrial, the jury convicted him of first degree murder and sentenced him to death. The United States Supreme Court held as follows:

> When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. . . . Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States. (Emphasis added).

CONCLUSION

The Petitioner was entitled to a certificate of appealability and federal habeas corpus relief modifying her sentences to time served, concurrent, or alternatively to a sentence less than consecutive sentences.
The Petition for a writ of certiorari should be granted and this case should be set for a full hearing by the Court. In the alternative, certiorari should be granted and the decision below summarily reversed, sending the case back for further proceedings.

Respectfully submitted,



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